

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

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UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 77-1354

United States of America,

Appellee,

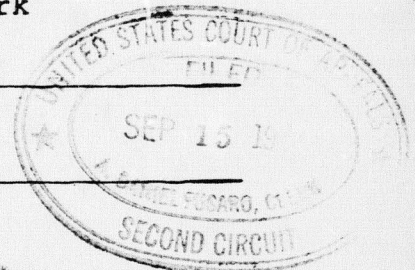
against

AMREP Corporation, RIO RANCHO ESTATES, Incorporated,
ATC REALTY Corporation, Howard W. Friedman, Chester
Carity, Henry L. Hoffman, Daniel Friedman,

Defendants-Appellants.

Appeal from Judgment of the United States District Court
for the Southern District of New York

BRIEF OF DEFENDANTS-APPELLANTS



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Appeal from Judgment of the United States District Court
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BRIEF OF DEFENDANTS-APPELLANTS

Issues Presented for Review

1. Where a juror in a criminal case was not a resident of the district, were appellants denied their sixth amendment right to a "jury of the state and district wherein the crime shall have been committed"?

2. Did appellants waive their constitutional right to a jury of the district, where voir dire questions submitted by appellants, and rejected by the trial court, would have elicited the residence of each prospective juror, and where appellants made a post-trial motion to vacate their convictions promptly after they discovered that one juror was not a resident of the district?

Statement of the Case

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Metzner, J.) rendered on July 21, 1977, denying appellants' motion pursuant to 28 U.S.C. § 1651 for a writ of error coram nobis. Appellants have sought to vacate judgments entered on March 10, 1977 convicting them of 20 counts of mail fraud (18 U.S.C. § 1341) and five counts of violating the Interstate Land Sales Full Disclosure Act (15 U.S.C. § 1703(a)).*

The facts relevant to this appeal are extremely simple, and undisputed: Juror Number 2, Rosalind Eager, was not a resident of the Southern District of New York, where the trial was held and where crimes were alleged to have been committed, but of Oneonta, New York, in the Northern District. This was established by the affidavit of a private investigator, who interviewed Ms. Eager and others with knowledge of the facts subsequent to the trial. (A 11-13) The fact of Ms. Eager's residence in the Northern District was not disputed by the prosecution below (A 21-28), and the district court made no contrary finding. (A 29-30)

Moreover, it was not the fault of the appellants that the juror's true residence was not discovered until after

* The convictions were affirmed by this Court on August 8, 1977. On August 22, 1977, appellants filed a petition for rehearing and suggestion of rehearing in banc. That petition has not yet been acted upon.

trial. Appellants requested the trial court to ask all prospective jurors on voir dire examination the following questions:

Where do you presently live?
How long have you lived there?
If you have lived there for less than ten years, where did you live previously?

(A 3)

A truthful answer to even the first of these questions -- a question which Ms. Eager did answer truthfully when it was asked by appellants' private investigator after trial (A 11-12) -- would have disclosed that she lived outside the district and would have led to her disqualification.

However, the only questions put to Ms. Eager by the trial court were as follows:

Q. Miss Eager, are you employed?

A. No, I'm not at the present.

Q. Do you engage in any type of employment formerly?

A. Well, just some waitressing experience. I'm looking for a job.

Q. Have you heard the questions I put to the members of the panel?

A. Yes.

Q. From the answers that you would give to those questions, is there any information that you should bring to the attention of Court or counsel?

A. No.

Q. Do you know of any reason why you cannot sit on this jury and render a true and just verdict according to the evidence?

A. No.

(A 6)

As a result of the trial court's failure to ask questions regarding the residence of Ms. Eager, appellants were denied their sixth amendment right to a "jury of the State and district wherein the crime shall have been committed."

The Opinion Below

The district court's entire discussion of the issue presented by appellants' motion is as follows:

Assuming that juror number 2 was indeed not a resident of the Southern District of New York at the time she was sworn, the court is not required to vacate the judgments of conviction. It is clear that such a factor does not impair the impartial and intelligent performance of a juror's duties. United States v. Rosenstein, 34 F.2d 630, 634 (2d Cir. 1929); United States v. Haywood, 452 F.2d 1330 (D.C. Cir. 1971).

The Southern District residency requirement for jurors is statutorily based, 28 U.S.C. § 1865(b), and the general rule is that failure to satisfy the residency requirement is waived by a defendant after judgment is entered, even where defendant was ignorant of the fact and could have successfully objected to the juror sitting at the time of his or her examination. Rosenstein, supra.

(A 29-30)

Argument

I

APPELLANTS WERE DENIED THEIR SIXTH
AMENDMENT RIGHT TO A JURY OF THE
STATE AND DISTRICT WHERE THE CRIME
WAS ALLEGEDLY COMMITTED.

The right to trial by jury as guaranteed by the sixth amendment to the Constitution "is fundamental to the American scheme of justice." Duncan v. Louisiana, 391 U.S. 145, 149 (1968). And the jury guaranteed is a "jury of the State and district":

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

United States Constitution, Amendment VI.

It cannot be and it is not disputed that appellants in this case were deprived of that right, through no fault of their own.

In Zicarelli v. Gray, 543 F.2d 466, 467 (3d Cir. 1976) (in banc), the Third Circuit held:

At least in federal prosecutions, it is necessary that the jury be drawn from the state and from the federal judicial district in which the crime was committed.

The court in Zicarelli painstakingly traced the history of the vicinage requirement. Id. at 475-78. The first Congress was concerned that the wording of Article III did not guarantee

the common-law right to trial by jury of the vicinage, and thus caused that requirement to be inserted into the bill of rights. As noted by the court in Zicarelli:

[T]he proposition that a trial must take place before a jury drawn from within the state and federal judicial district in which the crime was committed was considered salient enough to be guaranteed by the Constitution.

Id. at 477.

The reasoning of the Supreme Court in Williams v. Florida, 399 U.S. 78 (1970) emphasizes the importance of the right to a jury of the state and district. In Williams, the issue was whether the sixth amendment's guarantee to trial by jury encompassed the right to a jury of twelve. In reviewing the amendment's history, the Court noted that as originally introduced by James Madison in the House, the amendment preserved the right to trial by "jury of freeholders of the vicinage . . . and other accustomed requisites." 399 U.S. at 94 (emphasis supplied). Among the "other accustomed requisites" was a jury of twelve. The version of the sixth amendment ultimately adopted, however, eliminated reference to "other accustomed requisites" but retained the right to a "jury of the State and district." In holding that the right to trial by jury did not include the right to a jury of twelve, the Supreme Court reasoned that by specifically providing for a "jury of the State and district" -- also an accustomed requisite -- Congress "knew how to use express

language" when it "wanted to leave no doubt that it was incorporating existing common-law features of the jury system." 399 U.S. at 97.

The sixth amendment violation complained of by appellants here is the deprivation of a right guaranteed in the "express language" used by the framers to "leave no doubt" that they were incorporating into our criminal jurisprudence a common-law feature of the jury system. Because that violation occurred, appellants are entitled to a new trial.

II

APPELLANTS DID NOT WAIVE THEIR CONSTITUTIONAL RIGHT TO A JURY OF THE STATE AND DISTRICT

It is basic that a constitutional right may be found waived only where the waiver is "knowing and intelligent." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Adams v. United States ex rel. McCann, 317 U.S. 269, 275 (1942). As Mr. Justice Black wrote in Johnson v. Zerbst, supra:

The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done." . . .
. . . .

. . . A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.

304 U.S. at 462-464.

Here, there was no "knowing and intelligent" waiver of the sixth amendment right to a "jury of the State and district." On the contrary, appellants took affirmative steps to preserve that right, by specifically requesting voir dire questions on the issue of residence. By not asking Ms. Eager those questions, the trial court eliminated appellants' only pre-trial opportunity to determine her residence. Obviously, any attempt independently to investigate a juror's residence during trial could be construed as jury tampering. When, after trial, Ms. Eager's true residence was discovered, appellants promptly sought relief from the district court. The district court nevertheless found a waiver, saying:

The Southern District residency requirement for jurors is statutorily based, 28 U.S.C. § 1865(b), and the general rule is that failure to satisfy the residency requirement is waived by a defendant after judgment is entered even where defendant was ignorant of the fact and could have successfully objected to the juror sitting at the time of his or her examination.

(A 30)

The district court's holding was based on a fundamental misconception. The right which appellants assert is not just statutory, but constitutional. The residency requirements for jurors in United States District Courts, 28 U.S.C. § 1865(b) and 28 U.S.C. § 1861, simply give effect to the sixth amendment. United States v. Duncan, 456 F.2d 1401,

1406 (9th Cir.), vacated on other grounds, 409 U.S. 814 (1972). The statutes do not replace, abrogate or alter the sixth amendment.

This fundamental distinction between statutory and constitutional rights was not addressed in either of the cases cited by the district court in its opinion. United States v. Rosenstein, 34 F.2d 630 (2d Cir.), cert. denied, 280 U.S. 581 (1929), held only that "[f]ailure to come within the statutory requirements [for jurors], such as citizenship, age, property, sex, and residence . . . may be waived by a defendant." Rosenstein, supra at 634 (emphasis supplied). The sixth amendment was not discussed. United States v. Haywood, 452 F.2d 1330 (D.C. Cir. 1971) reached a similar result, relying exclusively on Rosenstein and making no mention of the constitutional provision. By way of contrast, the court in United States v. De Alba-Conrado, 481 F.2d 1266 (5th Cir. 1973) held that even where a defendant failed to preserve his statutory challenge to the jury selection process, the constitutional issues he raised required a remand to the district court.

Appellants cannot in reason be held to have waived a constitutional right which they did everything in their power to preserve. Having discovered that a juror was disqualified as a matter of constitutional law, appellants are entitled to a new trial. United States v. McCorkle, 248 F.2d 1 (3rd Cir.), cert. denied, 355 U.S. 875 (1957).

Conclusion

The judgment appealed from should be reversed,
and the case remanded with instructions to vacate the
judgments of conviction.

Dated: New York, New York
September 15, 1977

Respectfully submitted,

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